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No. 89-1377

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

ANN TROITINO JOHNSTON, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTEENTH COURT OF APPEALS
OF TEXAS

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The State's brief in opposition consists of essentially three things: a misstatement of the facts of the case (Br. in Opp. 3-5, 8-10); a defense of the erroneous preponderance-of-the-evidence standard (id. at 11-12); and, despite that defense, a general denial that such a standard was applied in this case or is applied in Texas generally (id. at 8, 10-11). The State succeeds only in proving that the facts of this case do compel a finding of prejudice and that Texas courts are routinely applying standards that cannot be squared with Strickland v. Washington, 466 U.S. 668 (1984). Because this is a case in which those incorrect standards led to an incorrect result, and because the error infects Texas decisions generally, this is an appropriate case for a grant of certiorari.

1. Before we turn to the important legal issues presented by this case, we must clarify the factual setting in which those issues arise. The key dispute in this case is whether it was prejudicial for defense counsel to call a witness (Les Radford) who, among other damaging things, testified twice that petitioner admitted at the time of the accident that she needed to "sober up." See Pet. 9-10; 3 SF 200.[1/] The reason why that testimo-

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[1/] Because the court below denied petitioner's claim solely because it held she had not shown prejudice (Pet. App. 8a), the only issue before this Court is prejudice. It is true that the state court did not affirmatively hold that counsel's performance had been deficient, and we have not, as the State asserts (Br. in Opp. 8), ever said otherwise. But the only importance of that fact is that the issue will remain open for litigation on remand if this Court reverses. Even on that issue, it should be noted, Texas courts appear to be acting inconsistently with this Court's decisions. This Court has held that "even an isolated error of counsel" can constitute ineffective assistance of counsel (Murray v. Carrier, 477 U.S. 478, 496 (1986)) and that "the type of breakdown in the adversarial process that (Cont'd)

ny was so harmful was that, before that defense witness was called, the two witnesses to whom such a remark was supposedly made had given their direct testimony without claiming that petitioner had said anything about needing to "sober up." See 3 SF 70-85, 146-172.

The State does not deny that the alleged admissions of a need to "sober up" were the single most critical piece of evidence; to the contrary, the State proves their importance by relying on

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implicates the Sixth Amendment is not limited to counsel's performance as a whole" (United States v. Cronic, 466 U.S. 648, 657 n.20 (1984)). Texas courts, by contrast, invariably invoke "the totality of the representation afforded the accused" (Pet. App. 10a) as an excuse to overlook the impact of isolated errors. See, e.g., Ex parte Cruz, 739 S.W.2d 53, 58 (Tex. Crim. App. 1987); Bridge v. State, 726 S.W.2d 558, 571 (Tex. Crim. App. 1986); Wilkerson v. State, 726 S.W.2d 542, 548 (Tex. Crim. App. 1986); Butler v. State, 716 S.W.2d 48, 54 (Tex. Crim. App. 1986), cert. denied, 480 U.S. 940 (1987); Ex parte Perkins, 706 S.W.2d 320, 323 (Tex. Crim. App. 1986); Carr v. State, 694 S.W.2d 123, 126 (Tex. App. 1985, rev. ref'd).

those admissions over and over again in an effort to show petitioner's guilt. Br. in Opp. 3, 9, 10. Thus, far from denying the prejudicial impact of those alleged admissions, the State has established their enormous importance in this case. Moreover, the State compounds the error by pretending that the record contains statements that are simply not there. That deception is significant. The State cites transcript pages for the alleged statements by petitioner that she needed to "sober up" (3 SF 157-158, 168, cited in Br. in Opp. 3), but the words "sober up" do not appear on the cited pages. What do appear on those pages are statements by petitioner about being in poor condition and needing assistance -- statements that the expert testimony (3 SF 214-221) shows were the result of the injury she sustained in the accident.

By misrepresenting the evidence, the State masks the gravity of the error made by defense counsel at trial. Before the defense put on its case, the State's evidence of a necessary element of the crime--intoxication--consisted of the lay opinions of witnesses Brandes and Adams, which were based on their observation of petitioner's appearance and behavior just after the accident. The defense countered that testimony by presenting a medical expert who explained in detail how the head injury petitioner received would mimic the effects of intoxication,[2/] by

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[2/] The State attempts to belittle the neuropsychologist's testimony because he was not a physician. What the record reflects, however, is that the expert holds a doctorate and board certification in clinical psychology with specialized training in neuropsychology. 3 SF 211. Since neuropsychology is the specialized field that studies the effect of brain impairment on behavior, a neuropsychologist is more qualified than most physicians to explain the behavioral effects of a head injury, which were at issue at trial. (Cont'd)

bringing forward another witness who testified that petitioner did not appear intoxicated just after the accident, and by pointing to the absence of objective proof of intoxication. All of that evidence was undermined, however, because defense witness Radford gave the "sober up" testimony and reported Brandes and Adams as calling petitioner "loaded" (3 SF 201), "real drunk" (3 SF 205), and "f_____ up because of liquor" (3 SF 206). Before counsel's error in calling this witness, the State's evidence on intoxication was based on lay observa-

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See 3 SF 212. Moreover, the neuropsychologist based his opinion on undisputed medical records as well as photographs of the accident and witness statements. 3 SF 213-214, 243-244, 252-253. As he testified repeatedly, once the head is injured, it is impossible for a lay observer to draw any valid conclusions about drug use or intoxication. 3 SF 220, 224, 247. He also testified that a delay of a year between an accident and a neuropsychological examination does not make a difference in diagnosing the head injury. 3 SF 243, 249.

tions discredited by expert testimony. Therefore, an apparent admission of intoxication by the defendant had far more than a "reasonable probability" of tipping the scales for the jury. Strickland, 466 U.S. at 694.

While it is unfortunate that the State of Texas feels a need to misrepresent testimony so flagrantly in order to defend the judgment below,[3/] it is the

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[3/] The State has misrepresented the testimony at trial in other ways that are perhaps less important but no less disingenuous. For example, the State twice claims that petitioner's sister, who testified that petitioner was not intoxicated, did not see her until 45 minutes after the accident. Br. in Opp. 4, 10. The State cites no support for that statement, and there is none. The only evidence bearing on the point shows that petitioner's sister lives 10 minutes from the scene of the accident, was called immediately, and came there right away. 4 SF 346. The State also insinuates that petitioner left the scene of the accident prematurely (Br. in Opp. 3-4) when in fact the undisputed testimony shows that petitioner stayed at the scene for "about an hour" while "waiting for the police to show up." 4 SF 349, 358-359. The very police witness whose testimony the State cites also made clear (Cont'd)

State's heavy reliance on that very testimony that provides the most forceful proof of just how important and prejudicial Radford's testimony was. The facts of this case leave no room for doubt that the prejudice prong of the Strickland test was met. The application of an impermissibly high standard of proof by the court below led to an incorrect result that this Court should correct. It is to that error of law that we now turn.

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that "the suspect did not leave the scene before aid was rendered and it was just a regular major accident." 3 SF 132. Furthermore, petitioner left her name and the address to which she was going with bystanders (4 SF 353), but the police did not arrive until all of the witnesses and the parties had gone (3 SF 12-13). Similarly, the State claims (Br. in Opp. 9) that witness Adams observed petitioner run through a red light without braking, when in fact that witness testified that she did not look at the accident scene until after the accident (3 SF 151-152). Finally, the State contends that petitioner somehow suppressed evidence of her intoxication by "carefully avoiding receiving medical treatment" (Br. in Opp. 9), but in petitioner remained on the scene with the paramedics and therefore clearly was avoiding no one (4 SF 347-350, 381-382).

2. It is hornbook law in Texas that "[t]he defendant has the burden of proving ineffective counsel by a preponderance of the evidence." M. Teague & B. Helft, Texas Criminal Practice Guide § 91.02[5][a], at 91-11 (1989).[4/] The State therefore is forced to defend, and does explicitly defend, that standard. Br. in Opp. 11-12.

This Court, however, expressly rejected the preponderance standard in Strickland, 466 U.S. at 694: "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the out-

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[4/] Judge Marvin O. Teague, whose name appears first on the title page of this treatise (as "editorial consultant"), sits on the highest criminal court of the State.

come." In fact, the Court singled out the "preponderance" standard as applied to the prejudice prong (which the Court also referred to as the "outcome-determinative test") for special condemnation: "With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today." Id. at 697.[5/] The State's effort to defend its preponderance standard in the face of Strickland only serves to confirm that Texas will not come into conformity with this Court's

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[5/] The State quotes the passage immediately preceding this sentence as if it somehow supported Texas's standard for ineffective assistance. Br. in Opp. 11. But our issue is that Texas applies a "preponderance" standard to the "prejudice" prong of the Strickland inquiry, and neither the cases that the State cites nor the Strickland passage that the State quotes has anything to do with that issue.

decisions unless this Court reverses one of the erroneous Texas decisions.[6/]

3. While the State also asserts that the court below did not apply the "preponderance of the evidence" standard, the words that the court used reflect that such an impermissibly high standard was in fact applied. Since it is the

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6/ Applying an erroneous standard to the prejudice prong of ineffective counsel claims can have important practical consequences. A recent survey of 702 federal court of appeals cases involving such claims shows that the largest group, 41.45%, were denied because the court felt that no prejudice had been shown. Note, How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims, 77 Geo. L.J. 413, 430, 458 (1988). While "the circuit courts explicitly found that counsel's performance did not fall outside of the wide range of reasonable professional conduct in only 54.3% of all ineffective assistance claims," only 4.27% of the ineffective counsel claims were granted. Id. at 430, 458. The author of the study concludes that "proof of prejudice resulting from ineffective assistance of counsel is so virtually impossible that courts should not engage in fine calculations about the degree of prejudice caused by counsel's clearly inadequate performance." Id. at 440 (footnote omitted).

substance of a decision, not its incantation of particular phrases, that guides this Court's review, the application by Texas courts of constitutional principles that are clearly wrong cannot be ignored.7/

What is clear from the opinion is that the court below incorrectly focused on whether "the jury would have returned a verdict of not guilty" (Pet. App. 8a (emphasis added)), rather than asking the correct question under Strickland, which is whether "there is a reasonable probability that, but for counsel's unprofes-

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7/ Earlier this Term, for example, the Court reversed a decision that erroneously limited a Freedom of Information Act exemption to documents that had been originally compiled--as opposed to just compiled--for law enforcement purposes. The respondent alleged that the case did not present the question because the court of appeals had not used the exact words "originally compiled," but this Court disagreed. John Doe Agency v. John Doe Corp., 110 S. Ct. 471, 476 n.5 (1989).

sional errors, the result of the proceeding would have been different" (466 U.S. at 694 (emphasis added)). Not surprisingly, Texas's highest criminal court continues to make this same mistake. See Culver v. State, 786 S.W.2d 7, 8 (1990) ("appellant must show that but for counsel's unprofessional errors, the result of the proceeding would have been different") (emphasis added in part and omitted in part). Thus, there is simply no doubt that the prevailing Texas standard is much higher than constitutionally allowed. The limited discussion given to this issue in the opinion below simply reflects this consistent misunderstanding of the Strickland standard. Given the overwhelming weight of Texas authority behind a mistaken standard, it is not surprising that the court below, in what it apparently regarded as a routine af-

firmance, reflected the standards it was applying by reference to leading cases.

As Culver shows, it is on the "prejudice" prong, not the "deficiency" prong, that Texas courts are routinely disobeying the decisions of this Court. The State's contention to the contrary (Br. in Opp. 10-11) is simply wrong. See also note 8, infra.

Further evidence that the decision below results from an erroneous prejudice standard can be found in the cases it cites. See Pet. App. 6a, 7a, 10a (citing Wilkerson v. State, 726 S.W.2d 542, 548 (Tex. Crim. App. 1986), cert. denied, 480 U.S. 940 (1987); Rico v. State, 707 S.W.2d 549, 556 (Tex. Crim. App. 1983); Carr v. State, 694 S.W.2d 123 (Tex. App. 1985, rev. ref'd)). Although the court below cited portions of Wilkerson and Carr to support its decision, the por-

tions cited deal with the deficiency prong only. Wilkerson, 726 S.W.2d at 548-549; Carr, 694 S.W.2d at 126. Since the standard for deficiency is far harder to reach than the standard for prejudice, this citation, in a case hinging on prejudice, in itself shows a confusion harmful to the defendant. Compare Strickland, 466 U.S. at 689 (review of counsel's performance for deficiency is "highly deferential") with id. at 694 (lesser "reasonable probability" standard for prejudice prong).

We have already cited half a dozen Texas cases that expressly applied the erroneous preponderance-of-the-evidence standard to ineffective counsel claims. Pet. 17-19. To these cases could be added many more, from the Texas Court of Criminal Appeals (the highest criminal court) and the appeals courts. See,

e.g., Cannon v. State, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984); Hall v. State, 766 S.W.2d 903, 906 (Tex. App. 1989); Curtis v. State, 754 S.W.2d 460, 464 (Tex. App. 1988, rev. ref'd); Addington v. State, 730 S.W.2d 788, 791 (Tex. App. 1987, rev. ref'd); Carter v. State, 702 S.W.2d 774, 776 (Tex. App. 1986, rev. ref'd).[8/]

Even in its submission to this Court, the State persists in refusing to accept the standard of proof clearly laid out by this Court for evaluating the prejudice prong of ineffective assistance

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8/ The Cannon case, decided a month before Strickland and stating an impermissible "preponderance" standard, is routinely cited as the leading Texas case. The recent Hall decision, in a mastery of understatement, observes that "Texas' standards for determining ineffectiveness of counsel, particularly to determine when ineffectiveness is prejudicial, are not more protective than the federal standards enumerated by the Supreme Court in Strickland." 766 S.W.2d at 906 (emphasis added).

of counsel claims. Early in its brief, the State quotes extensively from this Court's description of the deference given to counsel's performance in the deficiency prong of the ineffectiveness inquiry. Br. in Opp. 7-8 (quoting Strickland, 466 U.S. at 697). The court below, however, assumed that petitioner's counsel performed deficiently, and addressed only the prejudice prong, which carries with it a less demanding standard. Pet. App. 7a-8a.

The State also makes the extraordinary assertion that, unless the defendant challenges the sufficiency of the evidence, a court, in determining whether counsel's deficient performance prejudiced the defendant, need not decide whether the prosecution evidence was strong or weak but can instead simply assume factual guilt. Br. in Opp. 10

n.4. That is, of course, not the law. See Strickland, 466 U.S. at 695-696; see also id. at 694 ("An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower."). The State admits that "the court below * * * assumed the facts supported by the verdict," as if there had been an error-free trial and the only challenge was to the sufficiency of the evidence. Br. in Opp. 10 n.4. This again confirms that the court below did not follow Strickland and, if it had, could not have reached the result that it did.[9/]

9/ In fact, it is the State that is trying to erect the wrong burden of proof by treating this case as if the question were evidentiary suffi- (Cont'd)

The proper task of the reviewing court was clearly set out in Strickland: "Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." 466 U.S.

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ciency. For example, the State observes that we cite "no authority" for the proposition that objective medical evidence of intoxication, which was wholly lacking in this case, is "inherently more reliable" than lay opinion testimony. Br. in Opp. 9. But (aside from the fact that that proposition is self-evident) the issue is not whether any particular evidence was "inherently more reliable" than any other kind; it is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 695 (emphasis added). The absence of any evidence of intoxication, other than lay opinion testimony, surely created a reasonable probability that, but for the introduction of damning evidence by defense counsel, the jury would have entertained a reasonable doubt about petitioner's alleged intoxication. See also Kimmelman v. Morrison, 477 U.S. 365, 390 (1986).

at 696 (emphasis added). That is not what the court below did in this case. Instead of evaluating the evidentiary picture before and after counsel's error, it assumed guilt (Pet. App. 7a) and then jumped to the conclusion that there was nothing counsel could have done to alter the outcome. Had the court properly followed the mandates of Strickland, it would have been compelled to recognize how weak the State's case was without the Radford testimony and then conclude that the Radford testimony not only bolstered the State's case, but likely erased any reasonable doubt the jury otherwise would have had concerning guilt. Thus, had the proper standards been applied correctly to these facts, the court below could not have affirmed the judgment of conviction on the basis on which it did.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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